No. 16305

United States Court of Appeals

FOR THE NINTH CIRCUIT

RUBY HUMPHREYS, Administratrix of the Estate of William Orvie Humphreys, Deceased ..... *Appellant*

v.

UNITED STATES OF AMERICA ..... *Appellee*

BRIEF FOR THE APPELLANT

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

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BRIEF FOR THE APPELLANT

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON

STATEMENT DISCLOSING JURISDICTION AND REVIEW

The complaint filed by the appellant in the District Court of the United States, District of Oregon, alleges that appellant's husband, William Orvie Humphreys, was killed by reason of the negligent acts of an employee of the United States while acting within the scope of his employment under circumstances where the United States, if a private person, would be liable to the appellant in accordance with the law of the place where the act or omission occurred (page 3 of the Transcript of Record).

Title 28, United States Code Annotated, Section 1346 (b), reads as follows:

> "Subject to the provisions of Chapter 171 of this title, the district courts, together with the District Court for the Territory of Alaska, the United States District Court for the District of the Canal

> Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act of omission occurred."

The complaint alleges that the negligent acts occurred in the State of Arkansas (page 4 of the Transcript of Record) and that statutes of Arkansas recognize a cause of action for wrongful death by the heirs or personal representative of a decedent (page 6 of the Transcript of Record).

Arkansas Statutes, Sections 27-906 and 27-907, read as follows:

> "Whenever the death of a person shall be caused by a wrongful act, neglect or default, and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then, and in every such a case, the person who, or company, or corporation which would have been liable if death had not ensued shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death may have been caused under such circumstances as amount in law to a felony. The cause of action herein created shall survive the death of the person wrongfully causing the death of another and may be brought, maintained or revived against the person representatives of the person wrongfully causing the death of another."

> "Every action shall be brought by and in the name of the personal representatives of such deceased person, and if no personal representative, then same shall be brought by the heirs at law of such deceased person. Every action authorized by this act shall be commenced within three years after the death of the person alleged to have been wrongfully killed and not thereafter."

It is alleged in the complaint that appellant is a bona fide resident of the State of Oregon, wherein the complaint was filed (page 3 of the Transcript of Record). The District Court wherein claimant resides has jurisdiction over the alleged cause of action. *Olsen* v. *United States* (CCA 8th S.D. 1949), 175 F. 2nd 510. *Knecht* v. *United States* (CCA E.D. Pa. 1957), 242 F. 2nd 929.

On March 31, 1958, appellant moved to dismiss her complaint without prejudice in order to refile in the State of Arkansas, for convenience of the parties (page 10 of the Transcript of Record). On March 21, 1958, the court granted same by appropriate order (page 10 of the Transcript of Record). On June 13, 1958, appellant filed a motion to show cause why said order should not be set aside (page 11 of the Transcript of Record) and on August 1, 1958, the lower court dismissed the motion (page 14 of the Transcript of Record).

The United States Court of Appeals, Ninth Circuit, has jurisdiction to review the order of the District Court of the United States, District of Oregon, as to the question of an abuse of discretion. Corpus Juris Secundum Volume 5A, Appeal & Error, Section 1631, page 174. *Pugh* v. *Bluff City Exersion Co.* (CCA 6th W.D. Tenn. 1910), 177 F. 399. *Vallery* v. *Glenwood Irrigation Co.* (CCA 8th Colo. 1918), 248 F. 483. *Cohen* v. *Young* (CCA 6th E.D. Mich. 1942), 127 F. 2nd 721. *Home Owners Loan Corporation* v. *Huffman* (CCA 8th W.D. of Mo. 1943), 134 F. 2nd 314.

STATEMENT OF THE CASE

On May 24, 1956, William Humpreys was killed in a well situated on property belonging to the United States Government, Forestry Division of the Department of Agriculture. Death was attributed to poisonous gases in the well. William Humphreys had gone into the well in an unsuccessful attempt to save his brother, Richard from death from the same cause.

Surviving William Humphreys are the appellant, Ruby Humphreys, and six minor children, ranging in ages from thirteen years to three years.

In July of 1957 the present suit was filed by Ruby Humphreys in the United States District Court for the District of Oregon against the United States of America under the Federal Tort Claims Act (Section 1346, Title 28, USCA), alleging that the death of William Humphreys was caused by the negligence of an employee of the United States under such circumstances as to render the United States liable in tort, if it were a private person.

The complaint alleged specifically that the brother of William Humphreys had gone into the well pursuant to an agreement with one John Lancaster, employee of the defendant, to clean out the well and while therein he became ill and called out for help; that William Humphreys entered the well pursuant to the call for assistance, and as a consequence he died from inhaling the poisonous gases. It was alleged that John Lancaster failed to advise either Richard Humphreys or William Humphreys that there had been a known leakage of poisonous gas in the well on previous occasions; failed to provide a safe method of egress to and from the well and in failing to station other persons at the top of the well in the

event of an emergency. Damages in the amount of $84,-000.00 were prayed by the appellant on behalf of herself and the minor children.

In response to the complaint, the United States filed an Answer stating, as its first defense, that venue for the action did not lie in the United States District Court for the District of Oregon but venue lay, if the suit were maintainable at all, in the United States District Court, for the Eastern District of Arkansas, for the reason that the appellant was a resident of Arkansas at the time of the death of William Humphreys. As its other defenses the defendant asserted, in effect, that John Lancaster had not acted negligently and that William Humphreys death was caused in whole or in part by his own negligence.

Subsequently, appellant's counsel moved on March 31, 1958, to dismiss the complaint upon the intention of the appellant to refile the action in the State of Arkansas for the convenience of the parties and their witnesses.

This motion was duly granted by an order of dismissal without prejudice entered on the same date as the filing of the motion.

Thereafter on June 13, 1958, counsel for appellant filed a motion to show cause why the order of dismissal without prejudice should not be set aside and the action reinstated. Accompanying the motion was the appellant's affidavit that the contemplated suit in the United States District Court for the Eastern District of Arkansas had not been filed until May 27, 1958, and as death had occurred on May 24, 1956, more than two years prior thereto, limitations had run against the appellant's cause of action and that justice would be preserved if appellant were permitted to reinstate her cause in the United States District Court, District of Oregon.

By order dated August 1, 1958, the Court entered an order denying the motion to reinstate the cause without explanation. The appellant brings this appeal.

POINTS RELIED UPON

The question presented by this appeal is simply one of whether it can be said that the refusal of the Court below to set aside its order of dismissal without prejudice and thereby reinstate the cause of action was an abuse of discretion.

ARGUMENT

Counsel for appellant concede at the outset that securing a reversal on the grounds of abuse of discretion would always appear to be a most difficult task. Only a sincere conviction that a careful scrutiny of this appeal will lead this Honorable Court to a recognition of a clear injustice gives us the temerity to undertake this appeal.

Stated in the simplest terms possible, the lower court had before it the question of whether the appellant's cause of action against the appellee was to be barred by limitations, or whether the Court, by the simple expediency of granting an order which it had full authority to do, should give life to a cause that was otherwise without it.

Let us briefly review the situation so as to make clear the appellant's predicament when the court below was called on to grant relief to the appellant in the form of reinstatement of the complaint.

The appellant filed suit on July 10, 1957, on an alleged cause of action against the government for the wrongful death of her husband some thirteen months previous (on May 24, 1956) under the Federal Tort Claims Act, being Title 28, United States Code, Section 1346. The filing of suit was within fourteen months of the date the cause of action arose (being the date of death) and was, therefore, well within the two-year period of limitations provided in the act, at Section 2401 (b), Title 28. The government, acting through the United States Attorney, District of Oregon, answered on October 4, 1957 (nearly four months from the filing of the complaint), and asserted, among other defenses, that the only venue for appellant's cause of action, if indeed she had one, was

in the federal court in Arkansas, where the cause of action arose.

Thereafter appellant on March 31, 1958, voluntarily moved to dismiss her complaint upon the express intention of refiling the suit in the State of Arkansas "for the convenience of the parties and their witnesses", and, incidentally, it would seem that appellant could have had no other purpose than the stated "convenience" of the parties, most particularly the defendant, inasmuch as the Act has been interpreted to allow suit at any place of residency of the plaintiff, regardless of where the occurrence took place. *Olsen* v. *United States* (CCA 8th S.D. 1949), 175 F. 2nd 510.

The court thereupon granted appellant's motion, on March 31, 1958, and as appellant's affidavit makes clear the contemplated suit in Arkansas was not filed within the two years provided for in Title 28, Section 2401 (b), U.S.C.A. Confronted with this fire situation, appellant promptly (on June 13, 1958) moved the court to permit the appellant's reinstatement of her cause by setting aside the earlier order of dismissal without prejudice. At this point, let it be stated, parenthetically, that counsel for appellant assumes full responsibility for this development, no part of which is attributable to appellant.

On August 1, 1958, the Court denied the appellant's motion and thereby the appellant was left without a means of presenting her cause upon its merits. This statement is made on the basis of the decision in *Jones* v. *United States* (D.C. D. C. 1954), 126 Federal Supplement 10, affirmed in 207 F. 2nd 563. This case presents a procedural problem identical to the case at bar. Suit was filed against the United States on an alleged cause of negligent misrepresentation in the Southern District of New York. Subsequently the cause was dismissed with-

out prejudice and filed in the District Court of the District of Columbia but not within the time provided in the Federal Tort Claims Act. It was held that the period of limitation provided in the Act (Section 2401 (b)) was not tolled by the pendency of the suit in the District Court for the Southern District of New York.

As we know of no rule of law which would make it mandatory upon the Court to grant a reinstatement of the cause, it must be regarded as a question which addressed itself to the sound discretion of the court and, traditionally, not subject to reversal except by reason of an abuse of such discretion.

What, then, constitutes an abuse of discretion?

There are many definitions for the term "abuse of discretion" and while the language used is varied, the definitions are, in effect, identical to a great extent, with some refinements here and there.

Abuse of discretion has been defined as action which is "arbitrary", *Hartford-Empire Co.* v. *Obear-Hester Glass Co.* (CCA 8th E.D. Mo. 1938), 95 F. 2nd 414; or "capricious", *Texas Indemnity Insurance Co.* v. *Arant,* 171 S.W. 2nd 915; or "improvident", *Quinn* v. *Gardner* (CCA 8th S.D. 1929), 32 F. 2nd 772; "a plain error of judgment", *State* v. *Griffin* (So. Carolina), 84 S.E. 876; "manifestly unreasonable", *Michaels* v. *Moritz,* 131 Pa. Super. 426, 200 A. 176; or "a clearly erroneous conclusion and judgment, one contrary to the logic and effect of such facts as are presented", *Starr* v. *State* (Okla.), 115 P. 356; or action that "effects an injustice", *Hale* v. *Hale,* 25 P. 2nd 246, 6 Cal. App. 2nd 661; "or a failure to exercise a sound, reasonable, and legal discretion", *Adair* v. *Pennewill,* 4 W. W. Harr. 390, (Deleware) 153 A. 859; "judicial discretion means nothing else but exercising the best of

the court's judgment on the occasion that calls it forth", *Bringhurst* v. *Harkins,* 2 W. W. Harr. 324, 122 A. 783.

American Jurisprudence, citing *Burns* v. *United States,* 287 U.S. 216, 77 L. Ed. 266, Volume 3, Appeal and Error, Sec. 959, states the general rule on discretionary matters as follows:

> "The rule is universal that the action of the trial court as to matters within its judicial discretion will not be disturbed unless there is a clear abuse thereof; or, as it is frequently stated, the appellate court will not review the discretion of the trial court. This rule, or rather this statement of the rule does not give the trial judge an entirely free hand in what might be termed discretionary matters. The exercise of judicial discretion which may not be reviewed implies conscientious judgment, not arbitrary action, takes account of the law and the particular circumstances of the case, and is directed by the reason and conscience of the judge toward a just result."

Perhaps the most realistic and practical effort has been suggested by decisions like *Usher* v. *Scranton Railway Co.* (CCA Pa. 1904), 192 Federal 405, wherein it was said that the matter of discretion is subject to no fixed rule "except a consideration of what is just", and *Thompson* v. *Stonom* (Ohio, 1943), 57 N.E. 2nd 788, wherein it was said that "the exercise of discretion does not necessarily follow strict rules of law, but may be exercised in what the court conceives to be demanded in justice", or *Delno* v. *Market Street Ry. Co.* (CCA 9th N.D. Cal. 1942), 124 F. 2nd 965, wherein the court defined discretion as:

> "The power exercised by the courts to determine questions to which no strict rule of law is applicable but which, from their nature, and the circumstances of the case, are controlled by the personal judgment of the Court."

In the case of *Hartford Empire Company* v. *Obearhester Glass Co.* (CCA 8th E.D. Mo. 1938), 95 F. 2nd 414, the Court stated, referring to questions of abuse of discretion, that "every investigation of this sort is governed by the situation and circumstances of particular case".

It would seem then that the court, in exercising discretion is held to a standard of reasonable, conscientious judgment toward the end that justice can be served. Moreover, it seems to us that if any one element should be paramount and entitled to greater consideration that other elements to be weighed in a consideration of the discretion of the lower court, it would have to be the question of justice. Is justice better served by the manner in which the court's discretion was exercised? Or is it not?

Clearly, in the present case, the effect of the court's ruling works an obvious and unmistakable injustice upon the appellant. The court had the power and the means to permit the appellant's cause of action to be re-instated. Without the exercise of that power the appellant is entirely without a means of presenting her cause upon the merits. What else can be said but that the effect of the ruling of the Court presents an injustice? The court holds the sole power by which the appellant may proceed, without it, *no means exists* by which she may have her cause litigated. Nor is this a case in which the granting by the court of that which the appellant is asking involved, coincidentally, a proportionate detriment to the appellee. Can the appellee contend that the Government of the United States is in any wise prejudiced by the order which the court refused to grant? Emphatically not, unless the reinstatement of the appellant's cause, which had been alive just a few short weeks before, is a prejudice to the Government. Indeed, we hope that the Government's position is not so precarious that it should strive to cling

to such advantage as was coincidentally worked by reason of the misadventure to which appellant befell. It seems that a zealous argument against the reinstatement of this cause by the appellee is not in harmony with the same spirit that moved the Congress to enact the Federal Tort Claims Act. How can the Government of the United States be heard to say that the granting of a reinstatement of the appellant's cause is prejudicial to the government? Has its position somehow been changed? Clearly not.

It is granted, of course, that the appellant's present misfortune occurred through no fault of the court, or of the appellee (or for that matter of the appellant) and the court can, with prefect accuracy, decline any responsibility for the result; neverthless, it is still a simple fact that the court held the key to the one door which could be opened to the appellant and enable her cause to be considered on its merits and this was achievable *without burdening the court or prejudicing the appellee.* Therefore, what possible objection could the court have had for declining to do that which the appellant asked? Is it any less the duty of a Court to work for a just and fair conclusion in the present situation? It seems to us that the duty of the Courts to do justice must overshadow all other considerations and where a means exists whereby justice may done to one party which is not unjust to the other party, a refusal by the court, without explanation, to effect such a means, is arbitrary.

Black's Law Dictionary, page 134, defines arbitrary as "not supported by fair, solid and substantial cause, and without reason given".

Appellant submits that regardless of which definition of abuse of discretion this Court may prefer, we can find no basis for justifying the ruling below. In the final

analysis it is clear that the decision works an injustice *without just cause,* and no matter what language is used it should be readily apparent that discretion was abused.

May we hasten to add that we are in a somewhat difficult situation in urging an earnest conviction that discretion has been abused without leaving the inference that a reflection has been cast upon the lower court. Such is certainly not intended. And indeed, decisions of various courts recognize that the term "abuse of discretion" is an unfortunate one in that it carries a connotation of judicial impropriety which is not contemplated or intended. In *Macauley* v. *Query,* 193 S.C. 1, 7 S.E. 2nd 519, it was said that abuse of discretion does not mean any reflection upon the presiding judge. In *Brown* v. *Beck,* 64 Ariz. 299, 169 P. 2nd 855, the Supreme Court of Arizona stated:

> "Abuse of discretion does not mean any reflection upon the presiding judge and does not carry with it an implication of conduct deserving of censure, but is strictly a legal term indicating that the appellate court is of the opinion that under the circumstances the trial court committed error of law in exercise of its discretion."

In *Eager* v. *Derowitsch,* 68 Wyo. 251, 232 P. 2nd 713, the Wyoming Court used similar words. And the United States Court of Appeals, Third Circuit, reached a similar view in *Beck* v. *Wings Field, Inc.* (CCA 3rd E.D. Pa. 1941), 122 F. 2nd 114:

> "The term abuse, however, when applied to a court's exercise of discretion is peculiarly of legal significance, wholly unrelated to the meaning of the same term when used in common parlance. Action that would be necessary in ordinary affairs to make one guilty of an abuse connotes conduct of a different grade than what is meant when a court is said to have abused its discretion. Abuse of discretion in law means that the court's action was in

error as a matter of law. And where such abuse exists, reversal will be ordered."

In the case of *Weeks* v. *Bareco Oil Co.* (CCA 7th N.D. Ill. 1941), 125 F. 2nd 84, the court went a step further and held, wisely we believe, that in cases (as in the present case) where the facts were not disputed, the upper court could exercise its own judgment rather than simply pass on the judgment of the lower court:

> "But what is abuse? Determination of abuse involves the exercise, by us, of sound judgment upon the facts. If there is controversy upon the facts, and if the facts themselves largely define the wisdom of the discretion, review by the appellate court is seldom effective and should not be. Then their, the appellate court's, review does not include the trial court's discretion.
>
> "If, however, the facts are not in dispute and it is a question of sound judgment based upon the undisputed facts which are before us as fully as before the trial judge (by affidavits) we are in about as good a position as he to say whether the discretion has been wisely exercised. In short, both trial and appellate courts have the same situation upon which to exercise the same sound judgment."

See also *In re Roth* (CCA 7th, 1942), 125 F. 2nd 396.

Several cases have held that an abuse of discretion results where the court fails or refuses to exercise its discretion. *Munroe* v. *Birdsey* (Florida), 136 So. 886. *Shurin* v. *United States* (CCA 4th, N. C.), 164 F. 2nd 566. *State* v. *Damon* (Mo), 169 S.W. 2nd 382.

From the foregoing citations five points would seem to be established:

1. The discretion to be exercised by trial court is broad, but not unlimited and is subject to review on appeal as to its justice, logic, reason and soundness.

2. Every case is to be considered on its own facts and circumstances.

3. A determination by an appellate court that the trial court has abused its discretion carries with it no connotation that the integrity or ability of the court is questioned.

4. Where the discretion of the trial Court called for a determination *not* involving a dispute of a fact question, then the upper court is as well able to decide the issue as the lower court.

5. An abuse of discretion occurs when the court refuses or declines to exercise its discretion.

We move from these general principles of abuse of discretion to the application of these principles to the specific problem, and it becomes at once apparent that as perhaps in no other field of the law, there is less likelihood of finding a precedent for the identical situation at hand. Indeed, the very nature of discretionary rulings is based upon a recognition that exact duplicate situations are unlikely to arise again, in precisely identical fashion.

We have found no case with an identical situation to the case at bar and we would be surprised if one existed. The following citations present either some basis for comparison to the situation presented by this appeal or involve circumstances containing some similarities, we hope not too distant, to be of assistance to this Court.

In the case of *In re Keith Macauley Ross* (California, 1937), 67 P. 2nd 94, 110 A.L.R. 217, the court held that the lower court abused its discretion in refusing to permit

appellant to change his name, although the statute clearly gave the court the discretionary power to grant or decline petitions for change of name. The change was apparently denied on the ground that Ross had taken bankruptcy and a change in name would work a fraud on those with whom he might deal on credit. Upper court stated:

> "We do not mean to suggest that the lower court must in every case grant a petition in proper form for change of name, but it is our view that some *substantial reason must exist* for the denial, and that none appears in the record before us. The judgment is reversed with directions to the trial court to grant the petition" (emphasis supplied).

In *Thompson* v. *Stonom* (Ohio, 1943), 57 N.E. 2nd 788, the Supreme Court of Ohio upheld the setting aside by the trial court of a jury verdict holding against a will which had been unopposed, although notice had been given in proper form to all interested parties, stating:

> "The exercise of discretion does not necessarily follow strict rules of law, but may be exercised in what the Court conceives to be demanded in justice".

Moreover, it may be said of the existing decisions dealing with discretion that the courts have been more concerned with effecting justice than in holding parties litigant to strict application of rules where unusual circumstances exist, and this is true even where the outcome can be said, at least in part if not entirely, to be attributable to mistake or neglect of a party or his counsel.

In *Automatice Oil Heating Company* v. *Lee* (Illinois, 1938), 16 N.E. 2nd 919, a judgment by confessions was entered against the defendant. Twenty days after entry of the judgment the defendant moved to "open up" the judgment. The reason for the entry of the judgment and the grounds for setting aside are not clear from the opin-

ion. Subsequently, an order was entered overruling defendant's motion. On appeal, the lower court was reversed on abuse of discretion and the court looked, not to the entry of the judgment so much as that a meritorious defense existed:

> "The general rule is that on motion to open a judgment entered by confession and for leave to defend the question of a meritorious defense is of much more importance than the question of the defendant's diligence, or lack of it."

In *Borst* v. *Young* (Massachusetts, 1939), 18 N.E. 2nd 544, the complaint was dismissed by the clerk after three years of inactivity; under rules of the court dismissal by the clerk was the equivalent of a final determination. The statement of fact states that "through the same negligence" nothing was done towards vacating the final decree till after death of first attorney. Later another attorney was employed and after still more months of delay a motion to vacate was filed and granted, approximately one year after entry of original dismissal. Lower court set aside the dismissal and defendant appealed on grounds of abuse of discretion. Affirmed.

In *Williams* v. *Pacific Surety Co.* (Oregon, 1914), 139 p. 934, the defendant demurred to the complaint; demurrer overruled and defendant elected to stand on his pleading and declined to file an answer. Court below entered judgment and later refused to grant defendant's motion to "open up" the judgment and permit the filing of an answer. The order below was silent as to its reasons for declining to open up the judgment. It appears from the opinion that the earlier judgment was affirmed on appeal. Also, it appeared that the defendant had relied on a rule of Oregon procedure in refusing to plead further which was somehow overlooked in the earlier opin-

ion. The upper Court held that an abuse of discretion had occurred in failing to open up the judgment, saying:

> "While the court below was invested with discretion in this matter, that discretion was a legal discretion to be exercised according to the principles of the law, and in a manner to do substantial justice. This discretion vested in the trial court is a legal and not an arbitrary or personal discretion, *and it must be so exercised as to do substantial justice under the circumstances of each particular case* (emphasis supplied).
>
> "To refuse to permit the appellant to answer, under the circumstances of this case, was in effect a denial of justice."

In *Boaz* v. *Martin* (Oklahoma, 1924), 225 p. 516, court below refused to vacate a judgment entered "in the absence of the plaintiff" at a regular day of the court (although it was Christmas Eve). The upper court stated expressly that the judgment was undoubtedly valid but refused to permit it to stand, holding that the court abused its discretion in not setting it aside, although apparently entered in proper fashion and in keeping with rules of lower court. It was noted in the opinion that counsel for plaintiff assumed that the court was not going to act again on pending cases before the following term, *but there is nothing in the opinion to indicate that counsel had a right to make such assumption.*

Finally, in *Levee District No. 4* v. *Small* (Missouri, 1955), 281 S.W. 2nd 614, a judgment of dismissal for failure to prosecute was entered on May 24, 1954, which the trial court refused to vacate on timely motion filed by plaintiff. It appeared that plaintiff had mistakenly assumed that a stipulation between parties working toward settlement had been filed in the cause. Also, the defendant had joined in plaintiff's motion to vacate. The

upper Court held that the lower court had abused its discretion and used language which must surely strike a responsive note with every practicing lawyer:

> "In judicial efforts to achieve the primary purpose and attain the broad objective of all litigation, which is, simply and succinctly stated, to do justice, no principle has found more universal acceptance than that each case must rest and be ruled upon its own particular facts. This is equally true in considering whether a case should have been dismissed for want of prosecution and in determining whether a default judgment should have been set aside (citations omitted). . . . These cases, involving the wisdom of trial judges in the exercise of the discretion vested in them by law, are in the nature of things to be considered one at a time, and not as an integral branch of our system of jurisprudence, where we can evolve certain rules of conduct that will fit any certain number of character of cases."

> "It is plain that the trial court committed no error in dismissing the instant case, but whether on the showing subsequently made, the judgment of dismissal should have been set aside is an entirely different question. Although courts are, no doubt, frequently vexed by the seeming indifference, inattention and carelessness of counsel, it is well for judges to keep in mind that they too were once practicing attorneys, and we are not inclined to be less ready and willing than defendants' counsel to recognize that the practical problems encountered by a busy lawyer are manifold and varied, impose heavy demands upon his time, mind and memory, and keep him under constant and unrelenting pressure, stress and strain. We would not be misunderstood as entertaining any views 'which will permit a party to trifle with the rules of practice of the court' or as discouraging dismissal of *inactive* cases for want of prosecution unless good cause for further continuance be shown. But, desirable as it is that courts should keep their dockets current, it

> is of greater importance that their work should be done with care and that they should be ever diligent and zealous in their unremitting efforts to attain the ends of justice'' (citation omitted).

We earnestly urge the court to grant to the appellant a trial upon the merits of her cause, and nothing more, by a reversal of this case upon grounds of abuse of discretion, and the only cause that will be served by so doing will be that justice prevailed.

Respectfully submitted,

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and
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